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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1345

U. S. MERCHANDISE MART, INC.,

Petitioner

v.

D&H DISTRIBUTING COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Petitioner, U.S. Merchandise Mart, Inc., Plaintiff-Appellant in the proceedings below, prays that a Writ of Certiorari issue to review the judgment therein of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia did not render an opinion but merely affirmed the lower court's decision. No written opinion was rendered by the United States District Court but an oral ruling from the bench constituting the opinion of the Court is included herein as Appendix A.

JURISDICTION

On January 28, 1975, without a written opinion, the United States Court of Appeals for the District of Columbia Circuit affirmed the action of the United States District Court for the District of Columbia in granting a directed verdict in an action brought under the Anti-Trust laws of the United States. Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where there was *uncontradicted* evidence that a wholesale distributor of television sets sold merchandise to Petitioner's competitors at a price lower than was offered to Petitioner, did the Court err in directing a verdict against Petitioner?

2. Where there was *uncontradicted* evidence that a wholesale distributor of television sets rendered advertising benefits to Petitioner's competitors which were not rendered to Petitioner, did the Court err in directing a verdict against Petitioner?

STATEMENT

This case involves an action under the Anti-Trust laws of the United States brought by a retail dealer in electronic appliances, including television sets. Such retail dealer – the Petitioner – asserted that the wholesaler sold RCA television sets to Petitioner's competitors at prices lower than were offered to Petitioner. Petitioner also asserted that the wholesaler placed advertisements in newspapers inviting the public to call a certain telephone number wherein the public would be informed of convenient retail dealers who were offering RCA television sets on sale. That when such telephone number was actually called, the public was given the names of Petitioner's competitors but not Petitioner.

The uncontraverted evidence introduced at trial showed that Petitioner had been supplied a price list for all of the products sold by the wholesaler – Respondent herein – and purchased television sets at such prices. The evidence further showed, without contradiction, that the Respondent sold to Petitioner's competitors various television sets at prices lower than the prices set forth in the above described price list and that at no time were those television sets offered to Petitioner at a reduced price.

The evidence further showed that advertisements were placed in newspapers by the Respondent concerning sales of television sets, which advertisements contained a telephone number to be called by the public who would then be referred to convenient retail dealerships. The evidence showed that when Petitioner failed to receive the expected flow of business from such advertisements, Petitioner had various parties call the telephone number described in the advertisements, identifying themselves as allegedly residing

close to Petitioner's store. The evidence showed that invariably these parties were referred to Petitioner's competitors, never to Petitioner. That despite the fact that Petitioner complained of this to the Respondent, no change resulted when later phone calls were made to the same number.

In addition to the evidence described above concerning discriminatory acts, there was further *uncontradicted* evidence of a drop in Petitioner's sales to the Public as compared to the year before such discriminatory tactics were introduced. The uncontradicted testimony in the case by Petitioner's President attributed this drop in sales solely to the discriminatory tactics of the Respondent.

Despite the fact that this evidence was uncontradicted and clearly showed preferential treatment with regard to prices and preferential treatment with regard to services, both of which are disallowed by the Anti-Trust laws, plus a financial loss suffered by Petitioner which Petitioner attributed to such treatment, the trial court directed a verdict in favor of the Respondent. The rationale of the trial court – which was affirmed in the United States Court of Appeals – was that there must first be a showing that at the same time that a sale is made at a preferential price to one competitor, a like sale take place at a higher price to the other competitor. That the sale of a product to one party at a certain price coupled with the *offer* of sale to another party at a higher price is insufficient to make out a case of discrimination.

REASONS FOR GRANTING THE WRIT

I. The decision in this case contravenes rulings by this Honorable Court by setting up artificial tests for violations of the Anti-Trust laws rather than looking to the entire transactions involved.

II. This decision distorts the intent and meaning of the Anti-Trust laws in authorizing price discrimination vis-a-vis competitors in those cases where a party is unable or unwilling to pay the higher price demanded of him.

It should be noted that in this case there was a directed verdict at the close of Petitioner's case where the evidence was *uncontradicted* that Respondent offered products to Petitioner at one price and thereafter sold the self same products to Petitioner's competitors at a lower price. The evidence was further *uncontradicted* that advertising services were rendered to Petitioner's competitors but not to Petitioner.

The rationale of the Court in dismissing Petitioner's case was that it must first be shown that a sale was actually made of a certain product to Petitioner at one price and simultaneously to a competitor at a lower price. Petitioner submits that there is nothing in the statutes or in the decisions of this Court which requires or authorizes such a test. In fact in numerous decisions, cited by this Court in *Continental Co. v. Union Carbide*, 370 U.S. 690 (698-9), this Court has pointed out that conspiracies in violation of the Anti-Trust laws should be viewed in their totality so as to see whether those laws are being violated and should not be subjected to microscopic examination of individual transactions one of which or all of which might be discarded if viewed alone. In the instant case

there was clear testimony of preferential treatment being offered to Petitioner's competitors. Under the circumstances, Petitioner submits that it was improper to set up artificial tests or criteria such as the one adopted in this case.

Most importantly the test adopted is not only artificial but distorts the intention of the Anti-Trust laws. Those laws are intended to afford equal treatment to competitors. Clearly if one competitor is offered a product at one price and another competitor is offered the same product at a lesser price, the laws are being violated then and there. Discrimination is occurring then and there. The adoption by the Court of a rule that no recovery can be made unless one party actually purchases the product at the higher price thus legitimizes discriminatory actions where the injured party is ether financially unable or unwilling to pay the higher price. Clearly such is not the intent of the Anti-Trust laws nor the decisions interpreting those laws. In fact in a prior decision of the United States Court of Appeals for the District of Columbia Circuit, namely *Exquisite Form Brassiere, Inc. v. FTC*, 112 U.S. App. D.C. 175, 301 F.2d 499, that Court recognized that a violation of the Anti-Trust laws occurred when there was merely the *offer* of service or better prices to one party without a corresponding offer to a competitor.

CONCLUSION

In short, the decision in this case if allowed to stand would authorize any and all discriminatory acts including sales, services, etc. unless the discriminated party is agreeable to pay a higher price as a prerequisite to filing suit. This case therefore presents important questions involving a weakening of the Anti-Trust laws and a departure from prior decisions of this Court. For these reasons Petitioner submits that this case is a proper one for the granting of certiorari.

Respectfully submitted,

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APPENDIX A

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * * * *

THE COURT: The Court has before it the defendant's motion for a directed verdict at the end of the plaintiff's case.

On a motion for a directed verdict, the Court must view the evidence in the light most favorable to the plaintiff and give the plaintiff the benefit of all inferences which the evidence fairly supports.

In this case under the Robinson-Patman Amendment to the Clayton Act, plaintiff must show in order to present a prima facie case evidence of, one, price discrimination; two, of interstate commerce; three, which may substantially affect competition; and, four, proximately causing damage to the plaintiff.

In absence of some evidence to establish each of these elements, the Court would be required to grant the defendant's motion.

During the recess the Court has gone over its own notes; the Court had read back to him the entire testimony of the witness Mr. Koger from the court reporter and the critical testimony of the witness Mr. Bennett.

After listening to this testimony and reviewing the notes and the Court's own recollection of the evidence, it is clear to this Court that on the first of these elements, that is, the element of price discrimination, and after researching again the law applicable, that there must be some

evidence of two or more transactions made by the same seller and that a single sale cannot violate the Act.

At least two sales transactions must be effected within a sufficiently limited period of time so as to be comparable. They must be actual sales.

An offer or an unaccepted order does not qualify. This was decided in the case of Jones against Metzger Dairies, Inc., 334 Fed. 2nd 919.

The Court has considered all of the evidence in this case, and it does not find any evidence here of two sales of like grade and quality at the same or about the same time.

The evidence does show that plaintiff and his competitors were purchasing from the same distributor. The evidence shows that at least up until the middle of March that the plaintiff had no complaint concerning the price or offerings that the distributor defendant had. It thus indicates that there was a difference growing out of some alleged emissions coming from the sets.

But with respect to the question of price, the testimony is that they were given the same price and that special deals were offered to them up until that time; that beginning about a month thereafter, which would be approximately the middle of April, that they no longer were offered special deals.

But as I have indicated, the cases hold that there must be actual sales; thus it would appear to this Court that there is no evidence from which the Court can determine or the jury could find as to when the sales of the items that were advertised that were testified to were made; and certainly there is no evidence that a second sale was made to the plaintiff at or about the same time.

And recognizing that the cases hold that there must be actual sales and that an offer to sell or even an unaccepted order does not qualify as a second sale.

Furthermore, it would appear from the evidence that in the absence of evidence of two sales, then there is no evidence that the defendant's conduct had any substantial effect upon the third essential element that I have mentioned, that is, substantial effect upon competition.

So that if there was no evidence presented here of two sales and no substantial evidence affecting competition, then, of course, we actually don't get to the question of damage because there has not been shown the other items.

On the other hand, this Court is further unable to find any evidence that plaintiff lost any profits as a proximate result of any price discrimination. I have been unable to find any evidence of the fact of damages proximately resulting from the alleged failure to give plaintiff's name over the phone.

The Court, therefore, has concluded that there is a failure on the part of the plaintiff to establish a prima facie case sufficient to submit this case to the jury. Therefore, the motion of the defendant for directed verdict is granted.

MR. INTRATER: Your Honor, may I ask the Court one question to attempt to clarify the record? Is it my understanding that when Your Honor refers to two sales that are acquired, by that Your Honor means one sale to the plaintiff at one price and another price to a competitor at a lower price? Those constitute the two sales?

THE COURT: They are the two sales. I think the law is quite clear on that.

And with respect to that, let me further state that this situation arose in the Shaw against Wilkins-Jones Company in the Third Circuit. And the case can be found at 105 Fed. 2nd 331.

This was on a motion to dismiss. And the Court there used the following appropriate language: "We are concerned only with one question: Has the appellant stated a cause of action against the appellee?

"The appellee contends that the appellee has discriminated in price between purchasers because the appellant refused to quote prices.

"The phrase 'to discriminate in price' employed in Section 2(a) considered by itself and entirely out of its context might be deemed to include a refusal to offer a price to a customer on goods which the latter desires to offer for resale.

"Such a conclusion is unsupportable, however, after consideration of other language in the Section. The discrimination in price referred to must be practiced between different purchasers, "quoting the words 'different purchasers'."

"Therefore, at least two purchases must have taken place.

"The term 'purchaser' means simply one who purchases or buyer or vendee. It does not mean one who seeks to purchase or a person who goes into the market place for the purpose of purchasing.

"In other words, it does not mean a prospective purchaser or one who wishes to purchase as the appellant contends."

Now, they had in this case a situation which was similar to the one that we have before us, and that is we had a plaintiff who was already a customer. And he raised this issue. And the Court said that that did not matter, the fact that the plaintiff was already a purchaser from the defendant.

* * * * *

THE COURT: Ladies of the jury, the Court in this case has disposed of this case without your making a decision on your own.

At this time the Court has directed a verdict for the defendant in this case, and that is your verdict in this case. Your verdict is for the defendant.

* * * * *

APPENDIX B

RELEVANT STATUTES

Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. . . .

Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. §13(a) (1970), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

Section 2(e) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. §13(e) (1970), provides in pertinent part:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

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No. 74-1345

U.S. MERCHANDISE MART, INC., *Petitioner,*

v.

D & H DISTRIBUTING COMPANY, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals correctly determined that the District Court was correct as a matter of law in granting respondent's motion for a directed verdict, in the absence of proof establishing a prima facie violation of Sections 2(a) or 2(e) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. §§13(a), (e).

STATEMENT

A. Proceedings Below.

This case began on July 22, 1971, when petitioner U.S. Merchandise Mart (hereafter Merchandise Mart) instituted an antitrust suit in the United States District Court for the District of Columbia against respondent D & H Distributing Company (hereafter D & H) alleging, *inter alia,* that D & H's sales of RCA television sets were transacted in such a way as to discriminate unlawfully against petitioner both as to price and related promotional services.

On January 23, 1974, a trial before a jury was held with respect to the claims of alleged violations of Sections 2(a) and 2(e) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. §§ 13(a), (e). On January 28, 1974, Judge Joseph C. Waddy directed a verdict in favor of respondent after concluding that petitioner had failed to establish a prima facie case under Section 4 of the Clayton Act, 15 U.S.C. § 15, for alleged violations of Sections 2(a) and 2(e) of the Robinson-Patman Act amendments to the Clayton Act (Pet. App. 1a-5a).

On January 28, 1975, the United States Court of Appeals for the District of Columbia Circuit affirmed, per curiam without opinion, the lower court's action in granting a directed verdict in favor of respondent.

B. Petitioner's Statement Is Devoid of Any Record Facts To Support the Contention of Discriminatory Treatment.

Petitioner is a retail dealer of appliances, including television sets, portable radios and stereos, and furniture, carpeting and bedding (Pretrial Order 1). Respondent is a distributor at wholesale of electrical

appliances, including television sets, portable radios and stereos manufactured by RCA Corporation (RCA) (Pretrial Order 2). During the period from January 1968 through mid-July 1968, Merchandise Mart purchased RCA products from D & H which amounted to approximately $28,000 in dollar volume (App. 81-83, 105).[1] In mid-July 1968, petitioner and respondent ceased doing business with each other (App. 81-82).

Simply stated, there is no record evidence that would establish the existence of any lower price or prices being charged by respondent to petitioner's competitors for a specific RCA product than were charged to petitioner for the same or a comparable product. At trial, petitioner presented no invoices reflecting the prices which Merchandise Mart or any of its competitors was actually charged for RCA products sold by respondent. Moreover, the record does not contain any comparative price data or information with respect to prices charged by respondent to petitioner and its competitors. Nor is there any evidence that respondent provided petitioner's competitors with a greater discount than the three percent discount made available to petitioner on the RCA products purchased by petitioner.

Mr. Cecil Koger, an appliance manager employed by petitioner, stated that he had no personal knowledge of competitors of petitioner purchasing RCA products from respondent at more favorable prices (App. 62-63). He could not recall any specific RCA product for which respondent contemporaneously charged peti-

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[1] References to the "App." are to the Appendix and Supplemental Appendix filed with the Court of Appeals for the District of Columbia Circuit.

tioner a higher price than was charged to petitioner's competitors (App. 65-66).

Mr. Norman Bennett, President of Merchandise Mart, testified that during the period from January through mid-July 1968, respondent provided petitioner with the following: (1) a three percent discount on the purchases of subject RCA products; (2) free delivery on these products; (3) extended credit with respect to its purchases of RCA products; (4) stocking allowances; and (5) credit for cooperative advertising allowances (App. 105-109). Further, Mr. Bennett and Mr. Koger admitted that Merchandise Mart purchased RCA products at reduced prices (App. 14-15, 108).

There was testimony from several of petitioner's employees that in May 1968 respondent advertised RCA color television sets in newspaper advertisements containing a telephone number to be called by prospective customers to determine the name of a local RCA dealer (App. 23-24). Petitioner's employees called D & H under the guise of being consumers (App. 15-17, 23-28, 31-33, 47-48). They gave the D & H employee an address which was in close proximity to petitioner as well as other retail dealers of RCA products (App. 16, 25, 32, 48). Petitioner's employees were not given the name of Merchandise Mart by the D & H employee. The record indicates that at no time were any customers or prospective customers of petitioner referred by D & H to a competitor (App. 110). There was no evidence in the record that petitioner had ever purchased any of the RCA television products which were the subject of the D & H advertisements (App. 15-17, 23-28, 31-33, 47-50).

ARGUMENT

A. The Petition Presents No Important Question of Federal Law, or Conflict Among the Circuits or Conflict with the Decisions of this Court.

The District Court and Court of Appeals have concluded that petitioner failed to establish a cause of action under the antitrust laws. Petitioner is now attempting to have this Court review, *de novo,* the evidence or the inferences to be drawn therefrom. This is totally at odds with this Court's recognized criteria for granting certiorari. See, *e.g., General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 178 (1938). There is no important federal question raised by the Petition. Nor does it involve any conflict among the circuits or with any decision of this Court. Review by this Court would be limited to the factual situation presented by the record. The petition should be denied since there is no substantive question under the Robinson-Patman Act amendments to the Clayton Act or any of the antitrust laws involved which has not already been decided by this Court.

B. Review by This Court of the Questions Presented by Petitioner Would Not Affect the Judgment in Favor of Respondent Since the Petitioner Has Not Challenged the Determination That It Had Failed To Establish Injury Under Section 4 of the Clayton Act.

The Petition raises two questions attacking the grant of a directed verdict in favor of respondent relating to the claims of price discrimination and promotional service discrimination. Petitioner does not challenge the District Court's determination of the absence of any evidence to establish injury or the fact of damage

under Section 4 of the Clayton Act (Pet. App. 3a).[2] Therefore, the question raised by petitioner would not alter the judgment below, since respondent would be entitled to a directed verdict based solely on the lower court's determination that petitioner had failed to present sufficient evidence of the fact of injury or damage under Section 4 of the Clayton Act.

C. Applying the Proper Standards, the Court of Appeals and District Court Concluded That Petitioner Had Failed To Establish a Cause of Action.

Relying on the well-established threshold requirement under Section 2(a) of the Robinson-Patman Act, the District Court concluded that petitioner failed to present any evidence of at least two sales transactions at different prices (Pet. App. 1a-2a). The District Court reached this conclusion after carefully assessing the testimony of the key witnesses presented by petitioner (Pet. App. 1a). Petitioner has not pointed to any specific evidence to contradict the lower court's assessment. Indeed, petitioner argues that the lower court's rationale—that two or more sales transactions at discriminatory prices must be shown—constitutes an artificial test (Pet. 5-6).

As denoted by this Court in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960), "discriminate in price"

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[2] Petitioner's claim of injury or damage was without factual foundation. Petitioner claimed damages of $300,000 based on purchases of approximately $28,000. Significantly, there was evidence negating the fact of injury over and above the absence of proof of price or related discrimination and the absence of proof of lost sales or lost profits (App. 55). In 1968, when Merchandise Mart ceased doing business with respondent, it increased its representation of General Electric products to take up the void left by RCA (App. 101).

under Section 2(a) means a price difference. In *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 45 (1948), this Court observed that a "discrimination in price" under Section 2(a) of the Act required, at a minimum, proof "that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors." Similarly, in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 756 (1947), this Court held that a single transaction could not violate the Act and that there must be proof that the same kinds of products "were sold to others at different prices within a relevant period of time, amounting to a discrimination...."

Viewing the evidence at trial in the light most favorable to petitioner and giving the petitioner the benefit of all reasonable inferences to be drawn from the evidence, both the District Court and Court of Appeals concluded that there was neither the quantum nor quality of evidence requisite to establish the elements of a violation of Section 2(a) of the Act. Totally absent from this record is any evidence that petitioner was charged one price for an RCA product and that a competitor was charged a lower price for a comparable product. In short, there is no factual basis to support an essential element of a Section 2(a) case—that petitioner Merchandise Mart was charged a higher price for an RCA product sold by respondent and that petitioner's competitors were charged a lower price by respondent for a comparable product.

Equally important, petitioner did not present any evidence that it had purchased RCA products of like grade and quality contemporaneously at prices higher than those charged to competitors by respondent. There

was no evidence that petitioner had purchased comparable RCA products—goods of like grade and quality—or testimony as to the time when the sales of the items which were the subject of alleged discrimination had been made to petitioner or its competitors. Again, petitioner points to no specific evidence which would tend to contradict the lower court's conclusion in this respect (Pet. App. 2a).

The lower court also concluded that there was no evidence of the likelihood of an adverse effect upon competition, which is a prerequisite in establishing a prima facie violation of Section 2(a) (Pet. App. 3a). Indeed, in the absence of any proof of different prices—a higher and lower price—being charged for like RCA products to petitioner and its competitors, there can be no basis for inferring the requisite adverse effect upon competition. See, *Admiral Corp.*, 67 F.T.C. 375, 424-425, 428 (1965).

Section 2(e) of the Robinson-Patman Act amendments to the Clayton Act prohibits a supplier from granting promotional services or facilities to a customer unless such assistance is made available to all competing customers on proportionally equal terms, 15 U.S.C. §13(e). In order to establish a Section 2(e) violation, the burden is upon the plaintiff to prove: (1) discrimination in the granting of promotional services or facilities; (2) in interstate commerce; (3) between competing customers; (4) with respect to contemporaneous transactions; and (5) relating to the sale of commodities of like grade and quality. *Atalanta Trading Corp.* v. *FTC*, 258 F.2d 365, 370 (2d Cir. 1958).

With respect to petitioner's claim that respondent failed to recommend petitioner when its employees responded to advertisements conducted by respondent D & H, there was no evidence that petitioner had purchased from respondent any of the RCA television products which were the subject of the advertisements, at a time contemporaneous with the advertisements, or indeed at any time. Nor was there any evidence that any customer or prospective customer of petitioner had been referred by respondent to a competitor. In addition, the referral of bogus customers to competitors in and of itself fails to demonstrate that any benefit had been conferred on competitors which had been denied to Merchandise Mart. See, *General Foods Corp.*, 52 F.T.C. 798, 828 (1956).

CONCLUSION

The Court of Appeals and District Court properly concluded that respondent was entitled to a directed verdict. Petitioner has raised no issue which would alter that determination. Therefore, the petition for certiorari should be denied.

Respectfully submitted,

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